STATE OF MICHIGAN

COURT OF APPEALS

FREDERICK GIORDANO,

Plaintiff-Appellant,

V

ALAN MARKOVITZ,

Defendant-Appellee.

UNPUBLISHED
June 17, 2003

No. 232793
Wayne Circuit Court
LC No. 99-935369-CB

Before: Gage, P.J., and Wilder and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant. We affirm.

This case is part of a lengthy legal dispute between these parties. At issue in this case are two business ventures in which the parties were involved. Both had been an officer, director, and 50% shareholder of a corporation known as Malan Entertainment Ltd. (Malan), and a 50% partner of a partnership known as Max Investment Group (MIG). MIG's only business was the ownership, maintenance, and leasing of premises to Malan for the operation of a nightclub named BT's.

By way of short background, sometime in 1990, after disputes arose between the parties with respect to their various business ventures, a lawsuit was filed.[1] During the lawsuit, the parties sought dissolution of both MIG and Malan. Thereafter, the parties stipulated and agreed to a private auction sale of the business known as BT's. Plaintiff was highest bidder at the auction sale. Subsequently, the parties executed an Agreement for Redemption of Partnership Interest and Stock Redemption. MIG was dissolved as a matter of law on August 27, 1994. Malan was never formally dissolved; however, plaintiff bought out defendant's shares in the

[1] This lawsuit primarily concerned the formation of another business named Almark, Inc. In that case, plaintiff filed suit against defendant and Almark alleging various claims. A counterclaim was filed that pertained to MIG and Malan.

corporation at the private auction sale and changed the corporation's name to Avenue Bistro Inc.[2] A formal Indemnification and Release Agreement was also executed on August 27, 1994.

In 1999, plaintiff filed the instant action seeking an accounting with respect to the partnership and corporation. Plaintiff claimed that although the partnership was dissolved in 1994, and for the past five years the parties have been involved in the winding up of the corporation, an accounting of the partnership and corporation has never been performed. Plaintiff maintained that the parties reserved their right to an accounting of both the partnership and corporation in the August 27, 1994 Indemnification and Release Agreement (release agreement). Plaintiff also alleged that during the winding up of the corporation, defendant made several wrongful distributions of the corporation's assets, which constituted a breach of fiduciary duties.

Defendant sought summary disposition pursuant to MCR 2.116(C)(7) and (8). The trial court granted the motion based exclusively on MCR 2.116(C)(8). Essentially, the trial court concluded that pursuant to *French v Mulholland*, 218 Mich 248; 187 NW 254 (1922), plaintiff could not maintain an action for accounting without seeking to set aside the settlement pursuant to the release. The trial court found that only where plaintiff had been defrauded in the settlement was there an available remedy. Ultimately, the trial court ruled that in order to recover, plaintiff must either rescind the dissolution and settlement, or seek a remedy at law in an action for fraud.

We review de novo a trial court's grant of a motion for summary disposition. *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 701; 609 NW2d 607 (2000). A motion pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim and should be granted only if a claim is so clearly unenforceable as a matter of law that no factual development could justify recovery. *Holland v Liedel*, 197 Mich App 60, 64; 527 NW2d 73 (1992).

With regard to the partnership MIG, MCL 449.21(1) provides:

> Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

MCL 449.22 provides for the right to an account:

> Any partner shall have the right to a formal account as to partnership affairs:
>
> (a) If he is wrongfully excluded from the partnership business or possession of its property by his copartners,
>
> (b) If the right exists under the terms of any agreement,

[2] This 1990 litigation was ongoing and involved the winding up of the businesses.

(c) As provided by section twenty-one [21],

(d) Whenever other circumstances render it just and reasonable.

Plaintiff argues he has the right to an accounting pursuant to subsections (b) and (d).

Plaintiff contends that the release agreement supports his claim for accounting. The release agreement provides, in pertinent part:

> Notwithstanding the foregoing, nothing in this Agreement shall be deemed to waive, release or otherwise affect the enforcement of (i) any claim, cause of action, suit or other rights which a party hereto may have against one or more other parties hereto arising out of or relating to the terms of this Agreement, the Private Auction Agreement or any of the Related Documents, (ii) the matters and acts which gave rise to or are the subject of United States v. Frederick Giordano, United States District Court, Eastern District of Michigan, Case No. 93-80897, (iii) any action by Markovitz or Giordano for an accounting, or (iv) any liabilities, assessments, etc. arising from any Internal Revenue Service audit of the Business, with respect to the operations of the Partnership or Corporation for the period prior to the date hereof . . . .

As the trial court correctly noted, the language of the release does not create a cause of action for accounting, but simply states that the release does not bar an action for accounting if, under the law, an action for accounting exits. Therefore, we must determine whether an action for accounting exists by law.

In his motion for summary disposition, plaintiff made allegations of fraud or breach of fiduciary duty on the part of defendant and also now alleges that defendant wrongfully distributed partnership funds. It is generally recognized in Michigan that

> [a]fter dissolution of a firm, one partner can enforce at law rights against another partner if they are clear and no elaborate account is involved, and if there is fraud [or deceit] by one partner on the other in the adjustment of the partnership relation, *the remedy is an action at law for fraud and deceit and not for a partnership accounting*. [Michigan Pleading and Practice (2002), § 7.02.50 (emphasis added); see also *French*, *supra* at 250.]

In *French*, the parties dissolved their partnership with the plaintiff buying out the defendant. Later, the plaintiff discovered that the defendant, before the dissolution, failed to account for certain profits. The plaintiff affirmed the sale, but then brought an action for accounting. The Supreme Court held that under the circumstances, an action at law for fraud and deceit was the proper remedy, not an action for accounting. Quoting with approval a case from Maine, the Court stated:

> "When the two members of which a firm is composed, settle their partnership affairs and dissolve, and one of them takes an assignment of the other's interest in the partnership property, paying therefore a sum agreed upon by them, and assumes the payment of the partnership debts, the effect of the

> arrangement is to extinguish the assignor's indebtedness to the firm. Such an arrangement implies that the assignor is to retain whatever he has already received from the firm, in addition to the consideration mentioned in the assignment. It is in effect an agreement that the sum paid is a balance due him after deducting what he has already received. No other rational interpretation can be put upon such an arrangement. It is impossible to believe that the one would pay or the other receive the sum agreed upon, unless all existing claims between them were to be thereby adjusted and settled. . . . If one of the parties is defrauded in the settlement (of which the want of proper entries may be strong evidence), the law furnishes him with two remedies; he may rescind the settlement, or bring an action on the case for the deceit. If he elects to rescind, he must do so promptly, upon discovery of the fraud, and restore whatever he has received under the settlement. If this is done, the parties are restored to their former rights, and made subject to their former liabilities. If, in consequence of the lapse of time, or a change of circumstances, a rescission has become impossible or undesirable, the injured party may still obtain ample redress by resort to an action for deceit. [*French*, *supra* at 251-252, quoting *Farnsworth v Whitney*, 74 Me 370 (1883).]

The Michigan Legislature adopted the Uniform Partnership Act by 1917 PA 72; thus, the UPA was in effect at the time *French* was decided. The holding in *French* is logical and controlling. The right to an accounting no longer exists after the partners have settled their affairs, except where a former partner believes he has been defrauded, in which case he can seek to rescind the agreement settling the partnership affairs. To hold otherwise would allow former partners to, at any time in the future, make costly and time consuming claims for accounting.

In this case, plaintiff has not sought to rescind the settlement or dissolution of MIG. Instead, plaintiff now attempts to assert an action for fraud. Because plaintiff has not sought to rescind the agreement, plaintiff has no right to a partnership accounting. His recourse, instead, would lie only in the form of an action for fraud, if such an action is viable.

With regard to plaintiff's claim for an accounting of the corporation Malan, again, because the release agreement does not explicitly provide for an accounting, plaintiff must show he is entitled to one by law. In his complaint, plaintiff alleged that he is entitled to an accounting of the corporation under the Michigan Business Corporations Act, MCL 450.1101 *et seq*. Neither plaintiff's complaint, nor his brief on appeal, references any single particular section of the Michigan Business Corporations Act. We will not search for support for such an argument. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001).

However, we note that Michigan law has established that actions for accounting against an officer or director of a corporation must be brought within one year from the time the person ceased to be an officer or director. Specifically, MCL 600.3605 states:

> (1) [c]ircuit courts have the power, and actions may be brought in the circuit courts:

> (a) to compel persons to account for their conduct in the management and disposition of the corporate funds and corporate property committed to their charge;
>
> * * *
>
> (2) This jurisdiction extends over all directors, managers, trustees, and other officers of corporations, and over any person who has held any of these offices in any corporation against whom proceedings are commenced within 1 year after he has ceased to be a director, manager, trustee, or other officer.

In this case, plaintiff bought out defendant's interest in the corporation in August 1994, and has owned and operated it ever since. The instant lawsuit was not filed until October 1999, five years later. We acknowledge that issues were raised in the previous lawsuit that involved the corporation; however, plaintiff now seeks an accounting more than five years after he obtained defendant's interest. Plaintiff has maintained the corporation's books and business. Accordingly, any claim for accounting against defendant now, five years later, is unenforceable.

Plaintiff also argues very briefly that he has a common law right to an accounting of the corporation. Plaintiff cites only two cases in support of his position: *Luyckz v R L Aylward Coal Co*, 270 Mich 468; 259 NW 135 (1935), and *Second Michigan Co-Op Housing Ass'n v First Michigan Co-Op Housing Ass'n*, 358 Mich 252; 99 NW2d 665 (1959). We note that neither of these is in conflict with MCL 600.3605; therefore, the statute would prevail. Moreover, the plaintiffs in *Luyckx* requested dissolution of an existing corporation. In this case, dissolution of the corporation is not an issue. Here, plaintiff bought defendant's shares and now maintains the business (albeit under a new name). Under the circumstances, we find no action for accounting exists. Therefore, the trial court correctly granted summary disposition to defendant.

Plaintiff also argues that the trial court erred in denying his motion to amend his complaint in order to plead fraud with greater specificity. A trial court's decision regarding an amendment to a complaint is reviewed for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would find no justification or excuse for the trial court's rulings. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999).

An amended pleading may introduce new facts, theories, and causes of action if they arise from the same transaction set forth in the original pleading. *Doyle v Hutzel Hospital*, 241 Mich App 206, 212; 615 NW2d 759 (2000). Leave to amend should ordinarily be granted, and only denied for "particularized reasons" such as, undue delay, bad faith, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party if the amendment is permitted, and futility of amendment. *Weymers*, *supra* at 658.

Ordinarily, if a trial court grants summary disposition based on the failure to state a claim, the parties must be given an opportunity to amend their pleading, unless such amendment would be "futile or cause prejudice to the opposing party." *Weymers*, *supra* at 658. An amendment to a complaint is futile if it adds allegations that still fail to state a claim. *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). Likewise,

an amendment is futile if, despite the substantive merits of the claim, the amendment would be legally insufficient on its face. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998).

In this case, the trial court did not abuse its discretion by ruling that an amendment to the complaint alleging fraud would be futile. The trial court correctly noted that an action for fraud is barred by the release agreement, which expressly releases defendant from all

> debts, claims, demands, actions, causes of action, suits, dues, sum or sums of money, accounts, bonds, warranties, covenants, contracts, controversies, promises, agreements, or obligations of any kind . . . and any and all other claims for demands of any nature whatsoever, whether known or unknown, accrued or unaccrued, in law or in equity.

Therefore, it would be futile to allow plaintiff to amend his complaint to state a cause of action for fraud because an action for fraud is barred by the release agreement.

Affirmed.

/s/ Hilda R. Gage
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood